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No. 06-53

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In The
Supreme Court of the United States

MR. JEFFREY F. JONES,

Petitioner,

v.

THE HONORABLE JANET R. BURNSIDE, JUDGE,

and

THE HONORABLE THOMAS J. MOYER,
CHIEF JUSTICE,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

In his Petition for a Writ of Certiorari, the Petitioner, Mr. Jeffrey F. Jones, respectfully prayed for this Supreme Court of the United States to grant a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants. Petition for a Writ of Certiorari, at 1, 30.

The Petition was filed July 10, 2006, it was received by the Clerk of this Court on July 12th, and it was docketed on July 13th. The Petition was served on the Respondents by Federal Express, and it was delivered to all of the Respondents on July 11th. The Petitioner notified the Respondents of the docketing of the same, on the forms provided by the Clerk's office, by United States First-Class Mail on July 17th (the same day he received the same from the Clerk's office).

The Petitioner has an obligation to keep this Court advised of new developments via supplemental briefs, especially when it is obvious that a suggestion of mootness will be made by the Respondents, *Board of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985), which is why he has filed this Supplemental Brief.

STATEMENT OF THE CASE (New Information)

On July 13, 2006, the Trial Court recused herself from the underlying case, unreported (reprinted *infra* App. 1); and on July 14th, the Presiding & Administrative Judge of the Cuyahoga County Court of Common Pleas reassigned this case to the Honorable Peter J. Corrigan, unreported (reprinted *infra* App. 2). The Petitioner received notice of this on July 18th.

As stated in the Petition, the Trial Court refused to recuse herself on February 9, 2006, in regards to the Plaintiff's Motion for Recusal, which was filed February 1st, Petition for a Writ of Certiorari, at 1, 3-4, App. 14; and she did not even read the Plaintiff's Reply in Support of his Motion for Recusal, which was filed February 9th and

denied as moot February 13th. Petition for a Writ of Certiorari, at 3-4, App. 15, App. 43-44 (¶20).

The Trial Court did not choose to recuse herself, when the Plaintiff filed his Affidavits of Disqualification in the Ohio Supreme Court on February 17, 2006, or when he filed his Reply in Support thereof on March 17th, or when he filed his Motion for Clarification and/or Reconsideration of April 7th, all of which were denied by the Chief Justice of the Ohio Supreme Court, on March 17th & 21st and April 11th, respectively. Petition for a Writ of Certiorari, at 1, 7-9, App. 1-9.

The Trial Court did not choose to recuse herself, when the Legal Malpractice Case II was transferred back to Cuyahoga County and consolidated with the Legal Malpractice Case I on March 22, 2006. Petition for a Writ of Certiorari, at 3.

The Trial Court did not choose to recuse herself, when the Plaintiff filed a Motion for Reassignment of the transferred and consolidated Legal Malpractice Case II, which was filed on April 28, 2006, and which was denied by the Presiding & Administrative Judge on May 15th. She did not choose to recuse herself, when the Plaintiff filed a Motion for a Change of Venue of the transferred and consolidated Legal Malpractice Case II, which was filed on May 30th, and which was withdrawn by the Plaintiff on July 20th.

The Trial Court did not choose to recuse herself, when the Petitioner filed his Application for Stay herein on May 12, 2006, which was denied on May 22nd, or when he refiled his Application for Stay on May 24th, which was denied on June 26th. Petition for a Writ of Certiorari, at 1; Docket No. 05A1067.

The only discernable reason that the Trial Court finally recused herself within two days of being served with the Petition is that she is apparently now trying to moot the Petition before this Court, which is obvious from

reading her judgment entry of recusal (reprinted *infra* App. 1).[1]

REASONS WHY THE PETITION IS *NOT* MOOT

While this is a judicial disqualification Case, the remedies that the Petitioner would request on the merits, if this Court accepts it for review, should be obvious from his Questions Presented for Review, to wit, a judgment from this Court (1) holding unconstitutional Ohio's (and most other states')[2] failure to ensure and protect the Petitioner's Fourteenth Amendment substantive due process right to a fair and impartial trial judge and chief justice, by its failure to adopt ABA Model Code of Judicial Conduct Canon 3(E)(1)(e) (1999), which provides for disqualification and recusal related to campaign contributions by parties and their lawyers over a certain threshold, or by its failure to adopt any other like standard; and a judgment from this Court (2) holding unconstitutional Ohio's failure to ensure and protect the Petitioner's Fourteenth Amendment procedural due process right to be heard on his substantive due process right to a fair and impartial chief justice, by its failure to provide a procedural mechanism or process for disqualifying an Ohio Supreme Court justice, when it provides a method for seeking disqualification of all other types of judges.

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[1] If the Trial Court honestly believed in judicial economy as a rationale for recusal, then she would have recused herself in February of 2006, when the Motion for Recusal was made, or in March of 2006, when she made admissions to the Ohio Supreme Court that should have compelled her recusal, and when she made so many omissions thereto of relevant facts that it was obvious that she was being disingenuous. *See* Petition for a Writ of Certiorari, at App. 36-45.

[2] In his Petition for a Writ of Certiorari, at 24, the Petitioner noted that thirty-nine states elect their judges, *Republican Party of Minnesota v. White*, 536 U.S. 765, 790 (2002) (O'CONNOR, J., concurring), but according to Professor Peter A. Joy, some forty-two states elect their judges. Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 672 & n.15 (2000-2001) (relying on data from the American Bar Association).

Certainly, the Petitioner would have asked this Court to order the disqualification of the Trial Court, but the scope of this Case is so much broader, because the Trial Court's recent recusal does not cure the fact that the Petitioner had to suffer a biased and prejudiced Trial Court from the filing of the Legal Malpractice Case I on December 30, 2003 until her recusal on July 13, 2006 – some two-and-one-half years later, and because that recusal does not cure the fact that the Petitioner had to suffer a biased and prejudiced Chief Justice of the Ohio Supreme Court, whose erroneous decision denying disqualification will be reported in the Ohio Cases. The Petitioner was deprived of his civil rights throughout this process, and the Trial Court's attempt to manipulate the jurisdiction of this Court by recusing herself now does not remedy these multi-year constitutional violations.

The Respondents caused real damage to the Petitioner by denying him his Fourteenth Amendment due process rights, as measured by substantially increased legal fees and expenses, by greatly increasing the time to get to final resolution on the underlying case, and by causing the Petitioner and his counsel to lose faith and trust in the fairness of the Ohio legal system, due to the Trial Court's numerous arbitrary and capricious rulings in the underlying case, and due to the Chief Justice of the Ohio Supreme Court's arbitrary and capricious denial of the Plaintiff's Affidavits of Disqualification – both of which are directly linked to the campaign contributions made to them by the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners, in the amounts of $8,300 and $26,900, respectively.

The remedy now is for this Court to order the State of Ohio to cure these constitutional defects in its judicial system, if it wishes to continue to rely upon an elected judiciary – and only someone standing in the Petitioner's shoes has standing to even address these issues. *Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 217-19 (5th Cir. 2001) (public interest plaintiffs and attorneys on behalf of their future clients, who complained of generalized past and future appearance of impropriety in the Texas legal

system, due to its failure to have a disqualification and recusal standard related to campaign contributions to judges by parties and their lawyers, lacked standing, because they did not allege – let alone suffer – specific injuries in fact).

"The test for mootness 'is whether the relief sought would, if granted, make a difference to the legal interests of the parties.'" *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc) (citation omitted). While the Petitioner does not know upon what basis the Respondents are expected to argue that this Case is now moot, it is *not* moot for at least the following reasons, all of which demonstrate that this Case would make a difference to the Petitioner's legal interests:

I. There Is Still a Live and Pending Case and Controversy Between the Parties

First, the underlying legal malpractice case between the Plaintiff and the Defendants is still pending, and there is still a live controversy between them. The Plaintiff does not know if the newly-assigned judge will stay on the case or recuse himself for some reason (the Plaintiff currently knows of no reason why he should); and either way, there is always the possibility that this new judge may be replaced before the underlying case proceeds to trial for a host of possible reasons. In any event, the Plaintiff is entitled that the Trial Court's replacement be untainted by campaign contributions made by the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners, yet the State of Ohio does absolutely nothing to inquire – let alone ensure – that this is so. As discussed in the Petition for a Writ of Certiorari, at 24, the only state that does is Alabama.

Whoever loses at trial is likely to appeal to the Cuyahoga County Court of Appeals, and the Plaintiff is entitled to have an appellate panel untainted by campaign contributions made by the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners, yet the State of Ohio does absolutely nothing to inquire – let alone ensure – that this

is so. Again, as discussed in the Petition for a Writ of Certiorari, at 24, the only state that does is Alabama.

And whoever loses on appeal is likely to petition the Ohio Supreme Court for a discretionary appeal, and the Plaintiff is entitled to have an Ohio Supreme Court untainted by campaign contributions made by the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners – which would be impossible, because through 2005, they have given the six Republican justices on the Ohio Supreme Court some $79,850.[3] Only one of these six justices falls below the Alabama financial threshold for disqualification.

In addition, it is possible that, for campaign contributions or other reasons, the Plaintiff would need to file another affidavit of disqualification in the underlying case in the future, and he would then be entitled to have a Chief Justice of the Ohio Supreme Court untainted by campaign contributions made by the Defendant Baker &

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[3] Campaign finance reports for county-wide elections are filed with the Cuyahoga County Board of Elections, which does not post them on its web site, and which discards them after one election cycle. As such, if one wants to investigate any contributions made to a specific judge, one has to make a public records request in person, wait for the records to be copied, and then examine them manually. Such reports for statewide elections are filed with the Ohio Secretary of State, who posts them on his office's web site, and multiple election cycles are searchable by candidate and contributor, among various other search options.

The Trial Court, when asked, refused to account for all of her contributions received from the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners prior to its last election cycle. Petition for a Writ of Certiorari, at App. 34, App. 39 (¶13), App. 55. Instead, she continued to solicit them. *Id.* at App. 38 (¶10).

The campaign finance information obtained about the Trial Court was presented in the underlying disqualification case, and it was obtained from the Trial Court's last county-wide election reports as well as from reports filed with the Ohio Secretary of State in regards to her unsuccessful run for a seat on the Ohio Supreme Court.

The campaign finance information obtained about the Ohio Supreme Court was presented in the underlying disqualification case, and it was obtained from reports filed with the Ohio Secretary of State.

Hostetler LLP, its Ohio PAC, and its partners – which would be impossible, because through 2005, they have given him some $26,900 (a number in excess of the per capita annual income in Ohio of $21,003, according to the 2000 U.S. Census).

As set out above, this issue is broader than just the Trial Court, and it goes to every judge or justice, who may eventually be called upon to hear the underlying case at trial or on appeal. *See Suster v. Marshall*, 149 F.3d 523, 527-28 (6th Cir. 1998) (judicial candidate's injunctive relief was not moot, even though the election had transpired, because the same or other candidates could face the same problem in the future), *cert. denied*, 525 U.S. 1114 (1999). Here, Ohio has done nothing to ensure that any future judges or justices will be free from campaign contribution induced bias and prejudice in favor of the Defendant Baker & Hostetler LLP, even though the Plaintiff unquestionably has a right to a fair and impartial judge or justice at every stage of the proceedings.

II. The Trial Court Is Trying to Insulate the Ohio Supreme Court's Ruling in her Favor from Further Review by this Court

Second, this Court has an "interest in preventing litigants from attempting to manipulate [its] jurisdiction to insulate a favorable decision from review," *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000), and it is obvious that the Trial Court is trying to do just that by recusing herself now.

Moreover, the Trial Court's voluntary cessation of its illegal conduct, i.e., sitting in a case, where she was biased and prejudiced, is almost never enough to moot a case. *See, e.g., United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case. . . .").[4]

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[4] This Court may recall that the Petitioner asked it on two occasions to stay the underlying case, but it refused to do so, Docket No.

(Continued on following page)

III. This Case Is Clearly Capable of Repetition, Yet Evading Review, If this Case Were Otherwise Deemed Moot

Third and finally, the campaign contribution/disqualification and recusal nexus[5] in this Case is clearly capable of repetition, yet evading review, if this Case were to be otherwise deemed moot, because, in addition to Section I, *supra*, "[m]ore than 3.1 million cases were filed in Ohio courts just in 2005: 2,444 in the [Ohio] Supreme Court; 11,477 in the courts of appeals; 229,352 in the courts of common pleas, general division; 77,888 in the domestic relations courts; 93,708 in the probate courts; 253,245 in the juvenile courts; 2,265,931 in the municipal courts (including 1,216,460 non-O.V.I. traffic cases); 204,019 (including 132,969 non-O.V.I. traffic cases) in the county courts; and 1,138 in the Court of Claims." Introduction by Chief Justice Thomas J. Moyer, Ohio Courts Summary Report (May 2006).[6] As such, this pay-to-play problem is not just likely to occur again, it is guaranteed to occur on a

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05A1067 – as did the Ohio Supreme Court, when it denied his Motion to Continue the Stay Pending a Petition for a Writ of Certiorari. Petition for a Writ of Certiorari, at 1, App. 8-9.

During the disqualification proceedings below, the underlying case was automatically stayed pursuant to Ohio law. OHIO REV. CODE ANN. § 2701.03(D)(1) (West 2006). This statute is reprinted in the Petition for a Writ of Certiorari, at App. 79.

[5] *See* Joy, *supra* note 2, at 671-82 (discussing the unprofessionalism of some judges, public opinion of judges and judicial integrity, the inadequacy of existing judicial disqualification standards, efforts to reform judicial selection processes, and the ethical behavior and civility of judges); *id.* at 692-95 (discussing proposals for improving professionalism by improving the professionalism of the judiciary, and the need to establish better recusal standards).

[6] Report available at www.sconet.state.oh.us/publications/annrep/05OCS/default.asp.

The latest report available nationally covers the year 2003, and it indicates that the total number of cases filed in state courts that year was approximately 100,100,000! Examining the Work of State Courts, 2004: A National Perspective from the Court Statistics Project, available at www.ncsconline.org/D_Research/csp/CSP_Main_Page.html.

regular basis in most, if not all, of the courtrooms in Ohio[7] – not to mention the thirty-eight (or forty-one) other states, where judges are elected.[8]

Moreover, as the Fifth Circuit has said, only someone in the Petitioner's shoes, who has actually suffered an injury in fact by way of a biased and prejudiced judge and chief justice, has standing to even challenge this gross distortion in the Ohio judicial system.[9] *Public Citizen, supra*, 274 F.3d at 217-19.

The answer to this vexing problem is not hard, it was first suggested by a Stanford Law Review student note in 1988,[10] it was put into action by the State of Alabama in

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[7] The American Judicature Society has a concise description of judicial selection in Ohio on its web page, which is available at www.ajs.org/js/OH.htm. According to the AJS, the Chief Justice of the Ohio Supreme Court has known since at least 1994, from a poll that he commissioned through his Citizens' Committee on Judicial Elections, "that nine out of ten Ohioans believed that judicial decisions were affected by political contributions." Quote available at www.ajs.org/js/OH_elections.htm. All of the polls done nationwide regarding the public's beliefs on this topic have produced similar results. *See, e.g.*, Joy, *supra* note 2, at 672-75 (discussing public opinion of judges and judicial integrity).

[8] According to the American Bar Association, besides the United States, the only other countries in the world that elect their judges are Russia and Switzerland. Report of the ABA Task Force on Lawyers' Political Contributions, Part II, at 4 (May 1998), *quoted in* Report of the ABA Ad Hoc Committee on Judicial Campaign Finance (May 1999), available at www.abanet.org/cpr/adhoc599.html.

A summary of the ABA's activities in judicial ethics is available at www.abanet.org/judicialethics/about/background.html, and information on the ABA's current judicial ethics project, its Joint Commission to Evaluate the Model Code of Judicial Conduct, is available at www.abanet.org/judicialethics/home.html.

[9] This distortion cannot be cured by imposing spending limits on judicial campaigns, since those violate the First Amendment. *Suster v. Marshall*, 149 F.3d 523, 528-33 (6th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).

[10] Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STANFORD L. REV. 449 (1988).

1995,[11] and it was codified by the ABA in the Model Code of Judicial Conduct in 1999.[12] Petition for a Writ of Certiorari, at 23-24. In the last ten years, the courts of Alabama have not been paralyzed by this very simple rule, and no Alabama litigant has been unable to find a disinterested judge to hear his or her case. As a matter of substantive due process, this Court should incorporate this type of standard into the minimum substantive due process standards that state judicial systems must afford litigants in order to comply with their due process rights guaranteed by the Constitution.

CONCLUSION

In conclusion, and for the foregoing reasons, this Case is *not* moot, and this Supreme Court of the United States should GRANT the Petitioner, Mr. Jeffrey F. Jones, a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants.

Respectfully submitted,

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[11] ALA. CODE §§ 12-24-1 & -2 (West 2006). These statutes are reprinted in the Petition for a Writ of Certiorari, at App. 75.

[12] ABA MODEL CODE JUD. CONDUCT Canon 3(E)(1)(e) (1999); *see* ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 245-46 (2004) (discussing 1999 amendment that resulted in Canon 3(E)(1)(e)). This canon is reprinted in the Petition for a Writ of Certiorari, at 23.

IN THE COURT OF COMMON PLEAS

CASE NO. CV-518194

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

JEFFREY F. JONES,)
Plaintiff)
)
vs.) **JUDGMENT ENTRY**
BAKER & HOSTETLER LLP, *et al.*,)
Defendants)

JANET R. BURNSIDE, JUDGE:

The undersigned voluntarily recuses herself from the above-captioned actions. While the Plaintiff's allegations of prejudice are baseless, Defendants are entitled to proceedings that are not likely to be interrupted by additional claims of prejudice. My voluntary recusal is not based upon any prejudice or bias possessed now or in the past; rather this Court recuses itself in the interest of judicial economy, saving the parties' valuable time and expense and allowing this action to come to a swift and just conclusion based on the parties' original dispute.

The above-captioned actions are transferred to the Hon. Nancy McDonnell, Administrative Judge, for re-assignment.

IT IS SO ORDERED.

/s/ Janet R. Burnside
JANET R. BURNSIDE, JUDGE

July 13, 2006

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JEFFREY F. JONES Plaintiff	Case No: CV-03-518194
BAKER & HOSTETLER LLP, ET AL Defendant	Judge: JANET R BURNSIDE **JOURNAL ENTRY**

95 DISP. TRANSIG – FINAL, 02 RE-ASSIGNED

CAPTIONED CASE BEING ORIGINALLY ASSIGNED TO JUDGE JANET R. BURNSIDE (302) AND FOR GOOD CAUSE SHOWN, THIS MATTER IS HEREBY REASSIGNED AND TRANSFERRED TO THE DOCKET OF JUDGE PETER J. CORRIGAN (344) FOR FURTHER PROCEEDINGS ACCORDING TO LAW

ADMINISTRATIVE JUDGE NANCY R. MCDONNELL

/s/ Nancy R. McDonnell 7-14-06
Judge Signature Date